W. v. W., 2002 BCCA 433 (CanLII)

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COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

P. W.

RESPONDENT
(PLAINTIFF)

AND:

D. W.

APPELLANT
(DEFENDANT)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders

The Honourable Mr. Justice Thackray

L.W.O. Smeets	Counsel for the Appellant
A.E. Thiele	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia June 28, 2002
Place and Date of Judgment:	Vancouver, British Columbia August 6, 2002

Dissenting Reasons on issue of cancelling arrears by:
The Honourable Mr. Justice Thackray (pp. 1-16, paras. 1-45)

Written Reasons in the majority by:
The Honourable Madam Justice Saunders
(pp. 17-19, paras. 46-53)

Concurred in by:
The Honourable Madam Justice Ryan

Dissenting Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] This appeal is from an order of Fraser J., entered 20 April 1999, in which he cancelled the arrears of spousal maintenance owing as of that date to the appellant D. W. and cancelled the spousal maintenance obligations of the respondent P. W..

BACKGROUND

Ms. W.

[2] Ms. W. was born in 1957. She has a Bachelor of Fine Arts Degree in Art and English, as well as some further post-graduate professional qualifications that qualified her to teach at both the elementary and secondary school levels in British Columbia. She was employed as a teacher in Bella Bella in 1984-85. In 1985-86, she worked as an advertiser and layout artist for the Alma Mater Society of the University of Victoria.

[3] Ms. W. moved to Gold River in 1986. The parties were married on 26 July 1986. A son, P.W., was born to them on *DOB*. The parties separated on 4 February 1992. They divorced on 9 June 1994.

[4] Ms. W. deposed that in 1986, she initially worked an average of twenty hours a week as an instructor for the North Island College in Gold River. She said that she was earning "about $32,000 per annum" but that after 1989 her earnings "fell to about $10,000 per annum, their present level." Ms. W.'s Property and Financial Statement, filed 29 March 1994, showed her monthly income as $923. Other than this, there is little information and no records concerning her employment in the years 1987 to 1997.

[5] On 2 September 1997, the Superintendent of Schools for District 84 of the Vancouver Island West School District offered Ms. W. a job as an Art and English teacher at Gold River Secondary School commencing 2 September 1997. The position was described as a "temporary appointment to the teaching staff" of the Gold River District. She accepted this offer.

[6] Ms. W. swore a Property and Financial Statement on 4 January 1998, which stated that her "gross estimated employment income was $1,543.78 a month."

[7] In September 1998, Ms. W. accepted a temporary, full-time position as an elementary school teacher in Kyuquot, British Columbia. This required her to move to Kyuquot with her son. Her salary at the time of the hearing before Fraser J. was $4,480.20 a month. In addition, she received an isolation allowance of $236.30 a month. This was for a ten month year making her gross income approximately $47,200 per annum. The period of her contract was from 1 September 1998 to 30 June 1999.

[8] In an affidavit sworn 2 January 1999, Ms. W. deposed that the move to Kyuquot had not been economically advantageous. The primary reason for this was the increased cost of living in an isolated community.

Mr. W.

[9] Mr. W. was born in 1952. In 1986, he was employed as an instructor for the North Island College in Gold River. In 1992, he accepted employment as a teacher at the North Island College campus in Courtenay, British Columbia.

[10] Mr. W.'s Property and Financial Statement of 13 October 1995 sets his gross income at $5,000 per month. Mr. W. deposed in January 1998 that he was earning "$2,380.77 gross pay every two weeks" and his Property and Financial Statement filed on 6 January 1998 shows a gross monthly income of $5,158.34. Mr. W.'s Property and Financial Statement of 5 February 1999 sets his gross income at $5,283.33 per month.

Spousal Maintenance

[11] Between April 1994 and August 1994, Mr. W. paid $7,000 in spousal maintenance. An interim order issued by Mr. Justice Oppal on 11 October 1994 provided that Mr. W. pay Ms. W. $1,400 a month. In the fall of 1995, Mr. and Ms. W. came to a settlement of their financial affairs that was embodied in a consent order issued by Mr. Justice Rowan on 8 November 1995. It provided that Mr. W. would pay $700 a month spousal maintenance and $700 a month child maintenance. (Mr. W. has fulfilled his child support obligations.)

[12] The order further provided for a wide range of financial arrangements, including an equal division of the family home. (The house is now in the name of Ms. W., with a mortgage in favour of her mother.) The order also stated that Ms. W. would "make her best efforts to become self-

sufficient as soon as possible" and provided for a "review every twelve months."

[13] Mr. W. made the maintenance payments of $1,400 a month pursuant to the order of Mr. Justice Oppal from October 1994 until November 1995. From November 1995 until December 1997, he made the spousal maintenance payments pursuant to the order of Mr. Justice Rowan.

[14] On 17 December 1996, Mr. Justice Rowan dismissed an application by Ms. W. to set aside the consent order of 8 November 1995.

[15] Mr. W. deposed in an affidavit sworn on 2 December 1988 that he learned in late 1997 that Ms. W. had full time employment. As a result, he did not make spousal maintenance payments from January to April 1998. He made the payments for May to July inclusive but has made no payments since. Mr. Justice Fraser calculated the amount of arrears to be $7,700 as of March 1, 1999.

[16] On 6 January 1998, Mr. W. filed a motion returnable on 26 January asking for an order cancelling or reducing spousal maintenance. Mr. W. did not proceed with this application.

[17] On 2 December 1998, Mr. W. filed the motion for cancellation of spousal maintenance arrears and for cancellation of spousal maintenance that was heard by Mr. Justice Fraser on 1 March 1999.

REASONS OF FRASER J.

[18] Mr. Justice Fraser delivered oral reasons for judgment at the conclusion of the hearing on 1 March 1999. He found that there had been a change in circumstances since the orders of 11 October 1994 and 8 November 1995. He held that Ms. W. was "no longer entitled to spousal maintenance" and that she had "not been entitled to spousal maintenance since September 1997."

[19] Fraser J. further cancelled all arrears of spousal support, which he estimated at $7,700. He said that to the extent that the arrears predated September 1997, he regarded them to have been offset by payments subsequent to that date that "were not, on the facts, justified." In his edited reasons for judgment, the trial judge said all arrears of spousal maintenance occurred in 1998 and 1999. He added that spousal maintenance payments that were made

between September and December 1997 "were undeserved" and that those made between May and August 1998 "may well have been undeserved."

[20] The order that was entered on 20 April 1999, and from which this appeal emanates, stated that the spousal maintenance order of 8 November 1995 was rescinded and that the spousal maintenance arrears existing under that order were cancelled.

ALLEGED ERRORS

[21] The appellant alleges that the trial judge "unreasonably found" that the change in her circumstances was "substantial enough to warrant variation of the spousal support order." Furthermore, she submits that the "rescission of the spousal support order, as opposed to some other remedy, was unreasonable."

[22] The appellant also submits that the trial judge erred in cancelling all arrears of spousal support, prior to the commencement of the respondent's application for cancellation of arrears.

DISCUSSION

Spousal Maintenance

[23] Counsel for the appellant submitted that Mr. Justice Fraser became preoccupied with the inaccuracy in Ms. W.'s declaration of her salary in 1998. He suggested that "the trial judge punished the appellant because of her lie." He said that this was not the appropriate test for the variation of spousal maintenance.

[24] While I accept that this would not be an appropriate test, I cannot agree that the learned trial judge lost sight of the proper principles because of the appellant's misleading information as to her salary. He set forth the incorrect figure of $1,543.78 per month that was contained in Ms. W.'s Financial Statement, noting that its source was unclear and had not been explained by counsel. He said that he was "unable to come up with any innocent explanation" for that figure.

[25] However, the trial judge appropriately noted that he had to be "extremely cautious in making findings of fact or characterizing credibility" in a chambers hearing where the parties did not give oral evidence. He accepted the

appellant's counsel's characterization of this statement as 'misleading'. In my opinion, this approach does not suggest that the trial judge's objectivity was compromised by the "misleading" statement.

[26] I also note the following statement from paragraph 21 of the trial judge's reasons:

> I then go to the criteria of the ***Divorce Act***. It requires, if I fix spousal maintenance, that that maintenance must be reasonable. It specifies that I must take into consideration the condition, means, needs, and other circumstances of each spouse, including the length of time the spouses cohabited, the functions performed by each spouse during cohabitation, and any agreement or order relating to the support of either.

[27] This passage supports the view that the trial judge kept an open mind and strove to apply the proper principles, in spite of his recognition of a potential credibility issue regarding the appellant.

[28] Mr. Justice Fraser specifically noted that the ***Divorce Act*** requires a recognition of economic advantages and disadvantages arising from the marriage or its breakdown. He found that there was "no evidence that Ms. W.'s career opportunities were hampered or inhibited by the marriage, except insofar as the birth of P.[was] concerned." He found that apart for this interruption, "both spouses sought and maintained salaried employment" during the marriage. I would also note that Ms. W. did not have permanent employment at the time she married. The trial judge concluded that any economic consequences suffered by Ms. W. as a result of the marriage were "minimal."

[29] As to disadvantages arising from the breakdown of the marriage, the trial judge said it did not appear that there was "any economic hardship presently being suffered by either spouse from the breakdown of the marriage." The appellant takes exception to this statement on the basis that her employment was only temporary. She asserts that she has not yet obtained self-sufficiency and refers in this regard to ***Balcom v. Balcom*** 1999 CanLII 2230 (NS S.C.), (1999), 2 R.F.L. (5th) 39 (N.S.S.C.).

[30] ***Balcom*** is simply a case in which the trial judge, having considered all of the evidence, including the fact that the wife's employment had been of short duration and without a guarantee of long-term stability, refused to terminate spousal maintenance. It contains no principles which might be applicable to the case at bar. Furthermore, the learned trial judge in the case at bar dealt at length with the temporary character of the appellant's position, and noted that "Ms. W. has been employed virtually full-time since September of 1997."

[31] The appellant also submits that the trial judge ignored the increased expenses allegedly incurred by Ms. W.. I would note that while there was affidavit evidence from Ms. W. that living in Kyoquot entailed higher costs, that evidence was selective and sparse. Furthermore, she received an isolation allowance of $236.30 a month. There was insufficient cogent evidence for Mr. Justice Fraser to do an accounting and arrive at a figure for increased expenses. Furthermore, he found that there was no "economic hardship" being suffered as a result of the breakdown of the marriage. This does not suggest to me that the trial judge ignored the expense issue.

[32] The appellant submits that the respondent's failure to have an annual review in keeping with the order of Mr. Justice Rowan compelled the trial judge to conclude that there was no change in circumstances. This argument has little merit, and is met head on by the fact that Ms. W., in her Property and Financial Statement for the hearing that the respondent had arranged, seriously understated her income. Mr. W. deposed that he did not insist upon a review "because [Ms. W.] did not have a great deal of income." As to the related arguments regarding Mr. W.'s alleged abandonment of his original application for variation of spousal maintenance, the trial judge dealt adequately with these in paragraph 27 of his reasons for judgment.

[33] Counsel for Ms. W. returned to the expense issue in submitting that the trial judge "unreasonably" concluded that there had been a change in the appellant's circumstances. As I understand his submission, it is that the appellant was no better off in 1999 than she was at the time of the court orders in 1994 and 1995. Counsel referred this Court to the appellant's Financial Statement of February 1994, which declared a monthly income of $923 and a monthly "shortfall" of 1,775.44, and her Statement of

December 1998, which declared income of $4,480 plus an allowance of $236.30 a month, but a monthly shortfall of $2,799.31.

[34] The trial judge said that Mr. W.'s assertion that there had been a "significant and material" change in circumstances was "unanswerable." He compared the declared income figures noted above and concluded that there was "unmistakably a material change in the circumstances." Totally apart from the credibility issue, I am of the opinion that the trial judge was entitled to come to that conclusion.

[35] Mr. Justice Fraser made specific reference to the provision in the ***Divorce Act*** regarding spousal maintenance, noted that those provisions were interpreted in ***G.(L.) v. B.(G.)***, 1995 CanLII 65 (S.C.C.), [1995] 3 S.C.R. 370 and held that the "test laid down by the Supreme Court of Canada" had been met. Most importantly, he held that "had the situation in October 1994 or November 1995 been what it is today … the original order would not have been made."

[36] The learned trial judge, after what I consider to be a complete review of the circumstances and the changes therein, held that the appellant was no longer entitled to spousal maintenance. In my opinion, he made no error in his findings of fact, appropriately considered the relevant legal principles and properly applied those principles to his findings of fact. I would dismiss the appeal on the issue of spousal maintenance.

Arrears

[37] As with the appeal on spousal maintenance, the appeal on arrears is taken from the order but the analysis of the order centres on the reasons for judgment. With respect to arrears, the reasons are minimal.

[38] The trial judge limited his comments on this issue to two paragraphs, of which paragraph 30 reads as follows:

> [30] Ms. W. also raises the issue of arrears. Mr. W. has been disobeying the consent order of November 1995, as he admits. This is often very troubling and irresponsible behaviour. This is a case in which I regard the failure to pay spousal maintenance in the months that I have identified as about as forgivable as it can get; and I

> conclude and find that it is very much in Mr. W.'s favour that he reinstated spousal maintenance payments in the spring and summer of 1998 when he believed, perhaps wrongly, that Ms. W. needed those payments. This is not a case of a contumacious refusal to pay someone who was in actual need. Disobedience to a court order should never be taken lightly, but occasionally there is a context which provides as much justification as can ever exist.

[39] It is conceded that Mr. W. disobeyed the court order to pay spousal maintenance, and this was acknowledged by the trial judge. However, he found the breach to be "about as forgivable as it can get." While I understand the trial judge's reasoning, I cannot accept that the possible moral justification for the breach could overcome Mr. W.'s legal responsibility. The trial judge said that disobedience to court orders should never be taken lightly. That obvious truth places an onerous burden upon a defaulting party to justify any disobedience. That burden, in my opinion, was not met in the case at bar.

[40] Mr. W. had a remedy available to him through the judicial process if he thought the maintenance situation had become unfair. He was not entitled to follow his own course of action. As Mr. Justice Warren stated in ***Lewis v. Lewis*** 1999 CanLII 5273 (BC S.C.), (1999), 2 R.F.L. (5th) 417 (B.C.S.C.) at paragraph 14:

> The recovery of arrears is important not only to compensate the receiving spouse for that improperly withheld, but also to demonstrate that the orders of Courts are to be obeyed, absent some feature delineated by statute or common law.

[41] Counsel for the respondent, quite properly, did not take a hard line on this matter. She acknowledged that no ethical lawyer would ever advise a client not to pay maintenance in the face of a court order to do otherwise.

[42] I would vary the order cancelling the arrears of spousal maintenance. There was some confusion at the time judgment was delivered as to what arrears were being

cancelled. Counsel for the appellant submitted in this Court that the trial judge erred in cancelling the arrears for the period prior to the respondent's application to cancel arrears. That application was made on 2 December 1998 but was not heard until 1 March 1999.

[43] That would result in a small reduction in the amount of the arrears. However, there is another factor that should not be overlooked. That is, but for Ms. W.'s incorrect assertion as to the amount of her income, an application for reduction or cancellation of spousal maintenance might have been made as early as January 1998.

[44] Mr. W. did not make his payments for the first four months of 1998, nor after July 1998. As the trial judge pointed out, the eleven months of arrears arose after the appellant made her false assertion.

[45] As both parties contributed to the accumulation of arrears, I would find them to be equally at fault and reduce the arrears by one half. Accepting the calculation of arrears to be $7,700, I would reduce that figure to $3,850.

The Honourable Mr. Justice Thackray

Reasons for Judgment in the Majority of the Honourable Madam Justice Saunders:

[46] I have had the privilege of reading in draft the reasons for judgment of my colleague Mr. Justice Thackray, with whose disposition of the appeal of the order cancelling spousal maintenance I concur. With respect, however, I would come to a different conclusion on the appeal of the order cancelling arrears of spousal support.

[47] As I understand Mr. Justice Thackray, he would permit the appellant to recover a portion of the arrears on the basis that the learned chambers judge failed to give adequate weight to the effect of the existing court order requiring payment of spousal support.

[48] It is, of course, of fundamental importance to the court system that parties comply with court orders. The system relies upon such compliance and provides avenues for challenging or modifying orders that may no longer fit the circumstances. However, the effect of an oath, being an assurance that statements made are the truth as known to the witness, is also of fundamental importance to the court system. A false oath undermines legal proceedings.

[49] The application before the learned chambers judge, although termed an application to cancel arrears, was in law an application to vary, rescind or suspend a support order under s. 17 of the ***Divorce Act***, R.S.C. 1985, c. 3. The threshold test on such an application is whether there has been a change of circumstances of either spouse. As the application is for an order with retroactive effect, the court, satisfied that the change of circumstances exists, will then consider whether, in the circumstances, it should exercise its discretion in the manner urged by the applicant. In consideration of the principle that a court order must be obeyed, a court will be chary in exercising its discretion to retroactively vary a support order but it is empowered to do so by the ***Divorce Act*** in the proper circumstances.

[50] As the order appealed involves the exercise of discretion, the issue for this Court is whether the learned chambers judge failed to give sufficient weight to relevant considerations or whether his order results in an injustice. In my view neither is the case.

[51] The chambers judge had evidence that Mr. W. had resorted to self-help in failing to pay spousal maintenance for 11 of the 14 months before the hearing. However, he also had evidence that Mrs. W. had sworn a Property and Financial Statement in January 1998 that significantly understated her income as $1,543.78 per month when it was actually over $4,000 per month. There being no adequate explanation for the sizeable discrepancy in Mrs. W.'s Property and Financial Statement, the learned chambers judge was entitled to consider that Mrs. W. had provided information on a material issue that she knew was untrue.

[52] The reasons for judgment in this case clearly demonstrate an awareness of the importance of enforcing court orders. Nevertheless, the chambers judge concluded, as I find he was entitled to do in the context of the evidence before him, that this factor should yield to Mrs. W.'s lack of candour and her change of circumstances, he being of the undoubtedly correct view that had Mrs. W.'s true income information been presented to the court in early 1998, spousal support would have been suspended at least, if not cancelled.

[53] It follows that I would dismiss the appeal in its entirety.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Ryan"